

NON-COMPETE AGREEMENTS AND THE EQUITY CONFLICT: APPLYING *BAKER V. GENERAL MOTORS* THROUGH THE LENS OF HISTORY

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I. INTRODUCTION

If a state court issues an injunction against an employee ordering him not to violate a non-competition agreement (“non-compete”), must a court in another state give Full Faith and Credit¹ to that order? What if enforcing the non-compete violates the state’s law? In *Advanced Bionics Corp. v. Medtronic Inc.*,² the Supreme Court of California considered a case in which two trial courts—one in California, the other in Minnesota—issued conflicting temporary restraining orders in a non-compete dispute in which the parties litigated simultaneously in both states.³ The Supreme Court of California resolved the conflict using principles of comity,⁴ but this option is not available to every state court.

Georgia courts, for example, are bound by state law that forbids the recognition of foreign judgments under principles of comity if doing so would violate state public policy.⁵ Since Georgia public policy weighs against enforcement of non-competes,⁶ recognizing a foreign judgment upholding such an agreement under comity may not be an option for Georgia courts. Perhaps recognizing the potential for inter-jurisdictional conflict, the United States Court of Appeals for

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¹ U.S. CONST. art. IV, § 1 (“Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.”).

² 59 P.3d 231 (Cal. 2002).

³ *Id.* at 232–35.

⁴ *Id.* at 237.

⁵ GA. CODE ANN. § 1-3-9 (2006).

⁶ *Id.* § 13-8-2.

the Eleventh Circuit in *Keener v. Convergys Corp.*⁷ amended an order issued by a district court that, applying Georgia law, forbade an employer from enforcing a non-compete anywhere in the nation.⁸ The court held that the order should have effect only in Georgia.⁹ Can this decision be rationalized with the Supreme Court of the United States' ruling in *Baker v. General Motors Corp.*,¹⁰ where the majority held that equitable judgments are not outside the reach of the Full Faith and Credit Clause,¹¹ but that some equitable orders can be denied Full Faith and Credit when they purport "to accomplish an official act within the exclusive province" of a state?¹²

This Comment will argue that, under *Baker*, decisions on the enforcement of out-of-state judgments in non-compete disputes lie outside the reach of Full Faith and Credit. Full Faith and Credit governs only relations between the states.¹³ While foreign judgments are conclusive as to the merits of a claim, a state court's decision as to the appropriate remedy for that claim is not binding on foreign state courts.¹⁴ Such decisions are within the "exclusive province" of states, as defined by the majority decision in *Baker*.¹⁵

Applied in the context of non-competes, this proposition leads to the conclusion that, while a state court may not reconsider the merits of a foreign court judgment on whether a non-compete has been violated, it may decide that the *lex fori* bars it from applying an injunctive remedy ordered by the foreign court.

This Comment begins in Part II with a discussion of the essence of conflict between the Full Faith and Credit Clause and equitable remedies. It analyzes two recent cases where these problems have manifested in the context of non-competes. Part III next examines *Baker v. General Motors Corp.*, the latest and most relevant precedent from the Supreme Court of the United States on the issue. It then looks to the case law that forms the bedrock of Full Faith and Credit

⁷ 342 F.3d 1264 (11th Cir. 2003).

⁸ *Id.* at 1269.

⁹ *Id.*

¹⁰ 522 U.S. 222 (1998).

¹¹ *Id.* at 234.

¹² *Id.* at 235.

¹³ See *M'Elmoyle v. Cohen*, 38 U.S. 312, 325 (1839). The object of Full Faith and Credit was to "produce such intimate relations between the states" so that they would not be as foreign sovereigns with respect to one another, and to provide certainty in the effect of judgments obtained in other states. *Id.*

¹⁴ See *id.* at 326 (noting that when making a determination as to "a plea to the remedy . . . the *lex fori* must prevail").

¹⁵ See *Baker*, 522 U.S. at 235.

jurisprudence for help in interpreting *Baker*, and discusses the questions that *Baker* left unanswered. It also explores how state sovereignty concerns pose the greatest stumbling blocks in resolving the conflict between Full Faith and Credit and equitable judgments. Part IV lays out the known boundaries of Full Faith and Credit, showing how the cases establish the circumstances in which Full Faith and Credit applies and when it does not. Part V argues that this case history suggests that equitable remedies awarded in non-compete cases lie beyond the reach of Full Faith and Credit. Finally, Part VI proposes liquidated damage clauses in non-competes as an effective alternative to equitable relief.

II. PROBLEMS ARISING WHEN FULL FAITH AND CREDIT IS APPLIED TO EQUITABLE REMEDIES IN NON-COMPETE CASES

A. “*The Equity Conflict*”

Equity conflict is a term coined by Professor Polly J. Price to describe “problems that arise when state courts issue equitable decrees that are intended to have extraterritorial effect.”¹⁶ When a state court issues an injunction with extraterritorial effect, the application of Full Faith and Credit creates concerns about a state extending its power beyond its own territorial boundaries.¹⁷

In her paper, Professor Price poses a hypothetical scenario in which the equity conflict arises in the context of a non-compete: an employee in Michigan who has signed a non-compete leaves his job, moves to Missouri, and takes a job with a competitor there.¹⁸ The former employer’s success in enforcing a non-compete might differ depending on whether: (a) the employer sues to enforce the non-compete in Missouri state court, which could rule that the agreement violates the state’s public policy; or (b) the employer sues in Michigan, obtains an injunction against the ex-employee there, and then sues to enforce the judgment in Missouri, invoking Full Faith and Credit.¹⁹

¹⁶ Polly J. Price, *Full Faith and Credit and the Equity Conflict*, 84 VA. L. REV. 747, 748 (1998).

¹⁷ *Id.* at 753.

¹⁸ *Id.* at 835–36.

¹⁹ *Id.* at 836.

B. Recent Examples of the Equity Conflict in Non-Compete Disputes

While states vary in the degree to which they permit non-competes to be enforced, two states—California and Georgia—take an extreme approach and reject almost all enforcement.²⁰ Georgia's public policy stems from a state constitutional provision prohibiting the Georgia General Assembly from authorizing contracts that inhibit competition.²¹ California's policy stems from a statute voiding contracts that restrain anyone "from engaging in a lawful profession, trade, or business of any kind."²²

Employers seeking to avoid these state policies to enforce non-competes are likely to craft choice-of-law clauses in the agreements to obtain favorable law; conversely, employees seeking to escape non-competes are likely to seek declaratory relief in a state that is unlikely to uphold non-competes.²³ The effect of Full Faith and Credit on such disputes is that the litigant who obtains judgment first, wins; if a litigant succeeds in being the first to obtain judgment upholding or nullifying a non-compete in one state court, then that judgment is binding on all other states.²⁴ As a result, non-compete litigation in many cases has been a race to the courthouse, or "race to judgment," in which speed and procedural maneuvers become more important than the facts of the case.²⁵

Thus, one question arising from the equity conflict concerns the reach of Full Faith and Credit: to what extent Full Faith and Credit enables states to export their public policies.²⁶ In addition, the conflict has generated questions of comity: should a court stay out of non-compete litigation brought in its own state when action on the same non-compete already has been commenced in another state?²⁷ Two recent decisions demonstrate the difficulty courts continue to experience in dealing with this problem.

In *Medtronic*, the employee, Stultz, had signed a non-compete with his employer, Medtronic, a Minnesota technology firm, in 1995, but in 2000 left the company to work for a California-based competi-

²⁰ Christopher D. David, *When a Promise Is Not a Promise: Georgia's Law on Non-Compete Agreements, as Interpreted by the Eleventh Circuit in Keener v. Convergys Corporation, Gives Rise to Comity and Federalism Concerns*, 11 J. INTELL. PROP. L. 395, 396 (2004).

²¹ GA. CONST. art. III, § 6, para. V(c).

²² CAL. BUS. & PROF. CODE § 16600 (Deering 2006).

²³ David, *supra* note 20, at 406–07.

²⁴ See Price, *supra* note 16, at 835–36.

²⁵ David, *supra* note 20, at 407–08.

²⁶ Price, *supra* note 16, at 753.

²⁷ See, e.g., *Advanced Bionics Corp. v. Medtronic Inc.*, 59 P.3d 231, 233 (Cal. 2002).

tor, Advanced Bionics.²⁸ Advanced Bionics and Stultz filed for declaratory relief in California, seeking to void the non-compete, and applied for a temporary restraining order (TRO) forbidding Medtronic from seeking relief in Minnesota.²⁹ The California court delayed ruling on the TRO application for a day despite Advanced Bionics' argument that Medtronic would use the time to file an action in Minnesota.³⁰ Medtronic immediately removed the California action to federal court, thus delaying the hearing on the TRO; it then filed a second action in Minnesota seeking an injunction to prevent the employee from working on a competing product for Advanced Bionics.³¹ The Minnesota court issued a TRO against Advanced Bionics and Stultz, barring them from pursuing further relief in any other court that would interfere with the Minnesota court's determination of the case.³²

Back in California, the federal court remanded the case to the California state court.³³ Thereafter, the Minnesota court replaced the TRO with a preliminary injunction, but apparently neglected to include language in the injunction prohibiting Advanced Bionics and Stultz from pursuing relief in the California case.³⁴ Advanced Bionics and Stultz then used the opportunity to obtain a TRO from the California court barring Medtronic from pursuing its case in Minnesota.³⁵ Subsequently, the Minnesota court amended the preliminary injunction and added language to order Advanced Bionics and Stultz to seek an order vacating the California TRO.³⁶ They did so, but the California court refused.³⁷ Medtronic then filed an interlocutory appeal in California.³⁸ The California Court of Appeal upheld the TRO, and Medtronic appealed to the Supreme Court of California.³⁹

The Supreme Court of California observed that "judicial restraint takes on a more fundamental importance" when cases involve

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 233–34. Medtronic was aware that Stultz was still a resident of Minnesota and that complete diversity did not exist. *Id.* at 234.

³² *Medtronic*, 59 P.3d at 234.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 235.

³⁸ *Medtronic*, 59 P.3d at 235. Medtronic filed the appeal after a failed round of negotiations, for which the California court temporarily lifted its TRO. *Id.*

³⁹ *Id.*

courts of different states, and that showing respect to a sister court was more important than avoiding an “embarrassing race to judgment.”⁴⁰ Despite the state’s strong policy against enforcing non-competes, the Supreme Court of California held that the policy did not outweigh the need to show respect toward the Minnesota proceeding.⁴¹ “A parallel action in a different state presents sovereignty concerns that compel California courts to use judicial restraint when determining whether they may properly issue a TRO against parties pursuing an action in a foreign jurisdiction.”⁴² Based on principles of comity, the California court overturned the TRO and permitted Medtronic to continue seeking relief in Minnesota:

[T]he laws of a state have no force, *proprio vigore*, beyond its territorial limits, but the laws of one state are frequently permitted by the courtesy of another to operate in the latter for the promotion of justice, where neither that state nor its citizens will suffer any inconvenience from the application of the foreign law.⁴³

Thus, in *Medtronic*, the Supreme Court of California avoided any Full Faith and Credit issue by limiting its holding to overturning the anti-suit TRO barring Medtronic from pursuing relief in its preferred forum of Minnesota.⁴⁴ As one concurring justice noted, the *Medtronic* decision leaves lower courts with limited guidance in dealing with similar issues in the future.⁴⁵ The key question—whether a court can ever force a court in another state to act contrary to its public policy in either enforcing or declining to enforce a non-compete—remains unresolved.⁴⁶

Medtronic involved a scenario where the employer beat the employee in the race to the courthouse, but when the reverse occurs—when the employee wins the race—courts face equally difficult decisions. In *Keener v. Convergys Corp.*,⁴⁷ the employee had worked for Convergys in Ohio, and signed a non-compete in 1995 in exchange

⁴⁰ *Id.* at 236 (quoting *Auerbach v. Frank*, 685 A.2d 404, 407 (D.C. 1996)).

⁴¹ *Id.* at 237.

⁴² *Id.*

⁴³ *Id.* (quoting *In re Estate of Lund*, 159 P.2d 643, 653 (Cal. 1945)).

⁴⁴ See *Medtronic*, 59 P.3d. at 238. In a concurring opinion, Justice Brown argues that the court should have denied the TRO based on California’s obligation to give Full Faith and Credit to Minnesota law, and complains that people might use California as a safe haven to “walk away from valid contractual obligations” simply by relocating to the state. *Id.* at 239 (Brown, J., concurring).

⁴⁵ *Id.* at 238 (Brown, J., concurring).

⁴⁶ The conclusion of the majority opinion in *Medtronic* makes clear that the litigants are free to continue pursuing the action in California until evidence is presented that a Minnesota court has issued a decision that is binding on California. *Id.*

⁴⁷ 312 F.3d 1236 (11th Cir. 2002).

for stock options.⁴⁸ The employee left Convergys for a Georgia-based competitor in 2001, but was not forthcoming with Convergys about where he was going.⁴⁹ After a chance meeting with one of his former co-workers, the employee received a message from Convergys's legal department reminding him of his obligations under the non-compete.⁵⁰ The employee separated from his new employer and then, together with the new employer, sought declaratory relief in the United States District Court for the Southern District of Georgia,⁵¹ which granted summary judgment to the employee.⁵²

Convergys appealed, and the United States Court of Appeals for the Eleventh Circuit certified a question to the Supreme Court of Georgia on the issue of which state's law should be applied.⁵³ The court answered that it would apply Georgia law.⁵⁴ Upon the return of the case to the Eleventh Circuit, the Court of Appeals had to consider the breadth of the district court's injunction, which prohibited Convergys from litigating the non-compete "in any court worldwide."⁵⁵

The Court of Appeals for the Eleventh Circuit held that the district court had abused its discretion by failing to tailor its ruling more narrowly so that the injunction would have effect only in Georgia.⁵⁶ The court stated that "Georgia cannot in effect impute its public policy decisions nationwide—the public policy of Georgia is not that everywhere."⁵⁷ Such a broad permanent injunction would interfere with the "parties' ability to contract and their ability to enforce appropriately derived expectations."⁵⁸ The district court's error was that its injunction went "beyond a reasonable scope" in applying Georgia's public policy nationwide.⁵⁹

The Eleventh Circuit decision in *Keener* leaves numerous questions unanswered. Perhaps the most glaring is why the reach of any judgment should be limited by a "reasonable" standard. The *Keener* decision is confusing because it implies that a court can—and in fact must—"waive" Full Faith and Credit in cases where issuing an equita-

⁴⁸ *Id.* at 1238.

⁴⁹ *Id.*

⁵⁰ *Id.* at 1238–39.

⁵¹ *Id.* at 1239.

⁵² *Id.*

⁵³ *Keener*, 312 F.3d at 1241.

⁵⁴ *Convergys Corp. v. Keener*, 582 S.E.2d 84 (Ga. 2003).

⁵⁵ *Keener v. Convergys Corp.*, 342 F.3d 1264, 1269 (11th Cir. 2003).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 1270.

ble decree might export the public policy of the forum state to all sister states.

III. *BAKER V. GENERAL MOTORS*: THE LAST WORD ON THE EQUITY CONFLICT

A. *Facts and Reasoning of Baker*

The intent of the Framers as to the application of Full Faith and Credit to equity is unclear.⁶⁰ Scholarship suggests that the Framers intended Full Faith and Credit mainly to ensure that judgments on debts in one state could be collected in every state.⁶¹ While it is well established that Full Faith and Credit applies to money judgments,⁶² the application of Full Faith and Credit to equitable decrees remains an open question.⁶³ The most recent decision from the Supreme Court of the United States addressing the issue is *Baker v. General Motors Corp.*⁶⁴

Baker concerned a former General Motors (GM) employee, Elwell, who had settled a wrongful discharge suit against GM in a Michigan state court.⁶⁵ As part of the settlement, Elwell stipulated that he would not testify as an expert witness against GM in any action filed against GM in the future.⁶⁶ When the *Baker* plaintiffs later filed a wrongful death suit against GM in Missouri state court, GM removed the case to federal district court.⁶⁷ The plaintiffs then sought to depose Elwell, and GM objected based on the stipulated agreement in Michigan that enjoined Elwell from testifying.⁶⁸

The district court permitted the Bakers to depose Elwell, on the grounds that: (a) refusing to allow Elwell to testify violated Missouri's public policy; and (b) presented with the same circumstances, the Michigan court would have modified the injunction.⁶⁹ Therefore, the

⁶⁰ Price, *supra* note 16, at 818.

⁶¹ *Id.* at 824.

⁶² RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 100 (1971).

⁶³ See *id.* § 102(c) ("The Supreme Court of the United States has not had occasion to determine whether full faith and credit requires a State of the United States to enforce a valid judgment of a sister State that orders the doing of an act other than the payment of money or that enjoins the doing of an act.").

⁶⁴ 522 U.S. 222 (1998).

⁶⁵ *Id.* at 226–28.

⁶⁶ *Id.* at 228.

⁶⁷ *Id.* at 229. The plaintiffs in *Baker* were Kenneth and Stephen Baker, the sons of a woman who died while a passenger in a GM vehicle. *Id.*

⁶⁸ *Id.* at 229–30.

⁶⁹ *Baker*, 522 U.S. at 230.

Missouri court could modify the injunction as well.⁷⁰ The United States Court of Appeals for the Eighth Circuit reversed, holding that the Michigan injunction against Elwell should have been given Full Faith and Credit, such that only the Michigan court could modify it.⁷¹ The Bakers petitioned for a writ of certiorari, which was granted.⁷²

The Supreme Court of the United States unanimously reversed.⁷³ Writing for the majority, Justice Ginsburg confirmed that Full Faith and Credit makes a court's judgment in any state *res judicata* for all sister states.⁷⁴ Furthermore, the majority opinion rejected a "public policy exception" to Full Faith and Credit.⁷⁵ Justice Ginsburg stated that equity decrees are not "outside the full faith and credit domain," and that the preclusive effects of a final judgment do not change based on "the type of relief sought in a civil action."⁷⁶

To this point, the opinion reads as though General Motors would prevail. However, citing *M'Elmoyle* and *Restatement (Second) of Conflict of Laws*, section 99, Justice Ginsburg wrote that Full Faith and Credit "does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments," and that "[e]nforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the even-handed control of forum law."⁷⁷ Justice Ginsburg recognized that orders "commanding action or inaction" had been denied Full Faith and Credit "when they purported to accomplish an official act within the exclusive province of that other State or interfered with litigation over which the ordering State had no authority."⁷⁸

The majority found the agreement to be preclusive as to claims between Elwell and GM, so that Elwell could not sue to recover more from GM on the wrongful discharge claim.⁷⁹ However, issue preclusion could not be exercised against a non-party to the prior adjudica-

⁷⁰ *Id.*

⁷¹ *Id.* at 230–31.

⁷² *Id.* at 231.

⁷³ Price, *supra* note 16, at 764.

⁷⁴ *Baker*, 522 U.S. at 233 ("For claim and issue preclusion (*res judicata*) purposes, in other words, the judgment of the rendering State gains nationwide force.") (footnote omitted).

⁷⁵ *Id.* ("[O]ur decisions support no roving 'public policy exception' to the full faith and credit due judgments.").

⁷⁶ *Id.* at 234.

⁷⁷ *Id.* at 235.

⁷⁸ *Id.*

⁷⁹ *Id.* at 237–38.

tion; the Michigan judgment could not “reach beyond the Elwell-GM controversy to control proceedings against GM brought in other States, by other parties, asserting claims the merits of which Michigan has not considered.”⁸⁰ The Michigan court could not preclude a Missouri court from determining which witnesses to allow in a completely unrelated action.⁸¹ The “mechanisms for enforcing a judgment” do not travel to a sister state under Full Faith and Credit; neither could the Michigan decree operate to determine what evidence could be brought in an unrelated suit.⁸² The majority opinion concluded that:

Michigan has no authority to shield a witness from another jurisdiction’s subpoena power in a case involving persons and causes outside Michigan’s governance. Recognition, under full faith and credit, is owed to dispositions Michigan has authority to order. But a Michigan decree cannot command obedience elsewhere on a matter the Michigan court lacks authority to resolve.⁸³

In other words, Full Faith and Credit need not be extended to determinations a court lacks the power to make.⁸⁴

In a concurring opinion, Justice Kennedy criticized the majority for unnecessarily extending its analysis when the issue could be resolved using basic Full Faith and Credit principles.⁸⁵ Because preclusive effects never extend to parties who were not parties to the original action, the Michigan court would not have extended the Elwell-GM settlement agreement to the Bakers.⁸⁶ Therefore, under well-settled law, Full Faith and Credit did not require courts of the United States to apply a Michigan decree in a manner that Michigan itself would not.⁸⁷ In Justice Kennedy’s view, the majority opinion created exceptions to Full Faith and Credit that had the potential “for disrupting judgments, and this ought to give us considerable pause.”⁸⁸

B. The History and Case Law Behind Baker

Although *Baker* did not involve a non-compete, it is not hard to imagine a scenario in which a court might have to apply the rule laid

⁸⁰ *Baker*, 522 U.S. at 238.

⁸¹ *Id.*

⁸² *Id.* at 239.

⁸³ *Id.* at 240–41.

⁸⁴ *Id.* at 241 (citing *Thomas v. Wash. Gas Light Co.*, 448 U.S. 261, 282–83 (1980)).

⁸⁵ *Id.* at 243 (Kennedy, J., concurring).

⁸⁶ *Baker*, 522 U.S. at 247–48.

⁸⁷ *Id.* at 247.

⁸⁸ *Id.* at 244.

down in *Baker* to a non-compete dispute.⁸⁹ The difficulty, however, is determining exactly what *Baker* means, and how the case might be applied in the context of a non-compete. Professor Price uses a historical approach to help explain the equity conflict and *Baker*.⁹⁰ Similarly, it is useful at this point to examine the history and case law behind the *Baker* decision to help predict what a court applying the rule of *Baker* to a non-compete dispute might decide.

Equity courts have claimed authority to issue orders with extra-territorial effect as far back as the English Courts of Chancery.⁹¹ While the Chancery asserted no authority to impose its will on a foreign sovereign or direct the outcome of a suit in a foreign court, it could indirectly impose an outcome by asserting its authority over the litigants.⁹² The Chancery could use its in personam power to compel a litigant to act or refrain from acting, even though the litigant might reside or have property outside the bounds of the Chancery's jurisdiction.⁹³

In the 1839 case of *M'Elmoyle v. Cohen*, the Supreme Court of the United States held that a judgment issued by a state court "does not carry with it, into another state, the efficacy of a judgment upon property or persons, to be enforced by execution."⁹⁴ In this case, a plaintiff obtained a judgment on a debt in South Carolina and filed a suit in Georgia to collect on that judgment.⁹⁵ However, Georgia law at the time placed a five-year statute of limitations on suits filed to enforce foreign judgments, and the statutory period had already expired.⁹⁶ The Court held that the defendant could plead this statute of limitations to defend against a suit enforcing a foreign judgment.⁹⁷ Thus, the Court held that Full Faith and Credit rendered the judgment of a court in a sister state conclusive, but only as to the merits.⁹⁸ To execute a judgment issued in a court of one state upon persons or property in a sister state, the judgment "must be made a judgment there."⁹⁹ Significantly, such judgments "can only be executed in the

⁸⁹ Professor Price hypothesizes such a scenario. Price, *supra* note 16, at 835.

⁹⁰ *Id.* at 750.

⁹¹ *Id.* at 802.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *M'Elmoyle v. Cohen*, 38 U.S. (13 Pet.) 312, 325 (1839).

⁹⁵ *Id.* at 312.

⁹⁶ *Id.*

⁹⁷ *Id.* at 328.

⁹⁸ *Id.* at 324.

⁹⁹ *Id.* at 325.

latter as its laws may permit.”¹⁰⁰ The Court in *M’Elmoyle* observed that nothing in the Constitution prohibits states from passing legislation to control “the remedy in suits upon the judgments of other states, exclusive of all interference with their merits.”¹⁰¹

Thus, at least at this early stage, the Court apparently perceived limits to Full Faith and Credit. The Court’s view of Full Faith and Credit in *M’Elmoyle* was twofold: (1) a state court’s determination as to the merits of a cause of action was conclusive as *res judicata* in all states; (2) a sister state could control how the remedy flowing from that determination should be administered, at least as far as it could place a statute of limitations on the enforcement of foreign judgments.¹⁰² Thus, to execute a judgment on a defendant’s person or property located in a sister state, the plaintiff had to file suit there.¹⁰³ Furthermore, this suit was more than a mere formality in which the sister state rubber-stamps the originating court’s determination as to the appropriate remedy.¹⁰⁴

In *Pennoyer v. Neff*,¹⁰⁵ the Supreme Court of the United States famously established that, despite the Full Faith and Credit Clause, money judgments rendered in other states were subject to collateral attack where the issuing state lacked personal jurisdiction over the defendant.¹⁰⁶ Nevertheless, in that same case, the Court in dicta affirmed the capacity of state courts to issue rulings with extraterritorial effect.¹⁰⁷ With respect to limits on the reach of state law, the Court asserted that “no State can exercise direct jurisdiction and authority over persons or property without its territory.”¹⁰⁸ The laws of each state had no effect outside the boundaries of the state except as was allowed by principles of comity, and no state court could “extend its process beyond that territory so as to subject either persons or property to its decisions.”¹⁰⁹ At the same time, however, the Court ac-

¹⁰⁰ *M’Elmoyle*, 38 U.S. at 325.

¹⁰¹ *Id.* at 328.

¹⁰² *Id.* at 328 (“[T]he effect intended to be given under our Constitution to judgments is that they are conclusive only as regards the merits; the common law principle, then, applies to suits upon them, that they must be brought within the period prescribed by the local law, the *lex fori*, or the suit will be barred.”).

¹⁰³ *Id.* at 325 (“[T]he judgment of a State court cannot be enforced out of the State by an execution issued within it.”).

¹⁰⁴ *Id.* (“[J]udgments out of the state in which they are rendered are only evidence in a sister state that the subject matter of the suit has become a debt of record . . .”).

¹⁰⁵ 95 U.S. 714 (1878).

¹⁰⁶ *Id.* at 734.

¹⁰⁷ *Id.* at 722–23.

¹⁰⁸ *Id.* at 722.

¹⁰⁹ *Id.*

knowledge that, because “contracts made in one State may be enforceable only in another State, and property may be held by non-residents,” the exercise of power by courts over people and property within their territory often would affect people and property outside their territory.¹¹⁰ Thus, while any effort by a state court to directly exert power over people and property outside its territory would “be resisted as usurpation,” “no objection can be justly taken” to a state court indirectly exerting such power.¹¹¹ For example, a state court could order a person domiciled within the state to execute a transfer of title to property located outside the state.¹¹²

This view of the limited nature of equitable jurisdiction played out in *Fall v. Eastin*,¹¹³ where a husband and wife jointly purchased property in Nebraska and subsequently moved to Washington.¹¹⁴ The husband then sued the wife for divorce, and the wife sought a ruling from the Washington court awarding her the Nebraska property, which the Washington court granted.¹¹⁵ The wife then sued in Nebraska to quiet title to the property, which she claimed the husband had tried to deny her by transferring it to another.¹¹⁶ The question became whether the Federal Constitution required the Nebraska court to give Full Faith and Credit to the Washington court’s decree.¹¹⁷ The Court held that the Constitution placed no such requirement on the Nebraska court.¹¹⁸ The Court stated that it was “firmly established” that a court in one state could not affect property outside its jurisdiction by decree.¹¹⁹ Full Faith and Credit “does not extend the jurisdiction of the courts of one State to property situated in another,” but instead “only makes the judgment rendered conclusive on the merits of the claim or subject-matter of the suit.”¹²⁰

While there are limits to Full Faith and Credit, the Court has found in numerous cases that Full Faith and Credit mandated an outcome. In *Fauntleroy v. Lum*,¹²¹ the defendant incurred a debt in

¹¹⁰ *Id.* at 723.

¹¹¹ *Pennoyer*, 95 U.S. at 723.

¹¹² *Id.*

¹¹³ 215 U.S. 1 (1909).

¹¹⁴ *Id.* at 2.

¹¹⁵ *Id.* at 2–3.

¹¹⁶ *Id.* at 4.

¹¹⁷ *Id.* at 4–5.

¹¹⁸ *Id.* at 11.

¹¹⁹ *Fall*, 215 U.S. at 11.

¹²⁰ *Id.* at 12.

¹²¹ 210 U.S. 230 (1908).

cotton futures in Mississippi, but declined to pay.¹²² The plaintiff later found the defendant in Missouri, and obtained a judgment there.¹²³ After the Missouri court found for the plaintiff based on Mississippi law, the plaintiff sought to execute the Missouri judgment in Mississippi.¹²⁴ However, because Mississippi law in fact made “dealings in futures” illegal, and forbade the courts from enforcing such contracts, the Mississippi court refused to enforce the Missouri judgment.¹²⁵ The Supreme Court of the United States held that the Missouri judgment was “conclusive as to all the media concludendi,” even though the Missouri court was in error in its assessment of Mississippi law.¹²⁶ The Missouri judgment was subject to challenge only for a failure of personal or subject-matter jurisdiction, and could not be impeached for a mistake of law.¹²⁷

In *Roche v. McDonald*,¹²⁸ the Court reached a decision that, at first glance, appears at odds with *M’Elmoyle*. In *Roche*, a plaintiff obtained a judgment in Washington, which he assigned to a second plaintiff six years later.¹²⁹ Finding the defendant in Oregon, the second plaintiff obtained a second judgment there.¹³⁰ The second plaintiff then returned to Washington and filed a third suit to enforce the Oregon judgment against the defendant.¹³¹ However, under Washington law, judgments had to be enforced within six years of their rendition, and this period had expired by the time the plaintiff filed the Oregon action.¹³² Thus, the Washington court refused to give Full Faith and Credit to the Oregon judgment.¹³³ The Supreme Court of Washington reasoned that the six-year time limit could not be extended by filing a second suit in a sister state, and that the Oregon court had failed to consider the six-year time limit under Washington law.¹³⁴ The Supreme Court of the United States reversed, holding that Washington could not refuse Full Faith and Credit to the Oregon

¹²² *Id.* at 233.

¹²³ *Id.* at 234.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 237.

¹²⁷ *Fauntleroy*, 210 U.S. at 237.

¹²⁸ 275 U.S. 449 (1928).

¹²⁹ *Id.* at 450.

¹³⁰ *Id.*

¹³¹ *Id.* at 451.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Roche*, 275 U.S. at 451.

judgment on these grounds.¹³⁵ *Fauntleroy* was the controlling case because the grounds for the Washington court's refusal to extend Full Faith and Credit to the Oregon judgment was that the Oregon court committed an error of law.¹³⁶ The defendant should have raised the Washington statute when the case was before the Oregon court; once the Oregon court had issued its decision, the opportunity to raise that defense had been lost.¹³⁷

This case history suggests that once a court has made a determination as to the merits of the case—how the law of the case applies to the facts—that determination cannot be overturned in another state simply because the enforcing state would reach a different conclusion if it applied its own law.¹³⁸ Given this strong history, it seems likely that once a court has issued a determination as to the validity of a non-compete, no court in another state could deny Full Faith and Credit to that determination based on the fact that its own law was different.¹³⁹ The remaining question is whether a court, asked to act in violation of its own policy in enforcing a determination issued by a court in a sister state concerning a non-compete, has any leeway under Full Faith and Credit to chart its own course.

C. *Questions Persist in the Wake of Baker*

One of the frustrating aspects of the majority opinion in *Baker* is that its core holding seems to be that Full Faith and Credit always applies to equity—except when it doesn't. Justice Kennedy expressed this frustration in his concurring opinion when he observed that “the majority, having stated the principle, proceeds to disregard it by announcing two broad exceptions.”¹⁴⁰ The majority's decision lives “in uneasy tension” with its rejection of a public-policy exception to Full Faith and Credit, leaving uncertainty in its wake.¹⁴¹ “In the absence of more elaboration, it is unclear what it is about the particular injunc-

¹³⁵ *Id.* at 454–55.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ The Supreme Court of the United States has had numerous opportunities to reconsider the rule that a judgment of a sister state cannot be questioned on the merits—even if the judgment is founded on a mistake of law—and repeatedly upheld it. See *Union Nat'l Bank v. Lamb*, 337 U.S. 38, 41–42 (1949); *Morris v. Jones*, 329 U.S. 545, 550–51 (1947); *Milliken v. Meyer*, 311 U.S. 457, 462 (1940); *Titus v. Wallick*, 306 U.S. 282, 291 (1939).

¹³⁹ See *Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908) (holding that the determination is “conclusive as to all the *media concludendi*”) (emphasis added).

¹⁴⁰ *Baker v. Gen. Motors*, 522 U.S. 222, 243 (Kennedy, J., concurring).

¹⁴¹ *Id.* at 245.

tion here that renders it undeserving of full faith and credit.”¹⁴² Justice Kennedy’s preferred approach would be not to address the Full Faith and Credit issue at all, unless absolutely necessary; even then, he would address the question only in a narrow fashion.¹⁴³

Yet, as Justice Breyer remarked during oral arguments for *Baker*, in 200 years of judicial history, the courts had failed to provide a clear articulation of how Full Faith and Credit applies to equitable decrees.¹⁴⁴ If the Court had adopted Justice Kennedy’s conservative approach, it might have been another 200 years before the Court addressed the question. At worst, the majority opinion in *Baker* fails to bring any more light to the darkness than existed before; at best, it provides kernels of guidance that may yet nudge the law toward a more definitive resolution to the equity conflict problem.

As evidenced by the decisions in *Medtronic* and *Keener*, numerous issues related to the equity conflict remain in the wake of *Baker*. In *Medtronic*, the Supreme Court of California decided the issue without directly addressing Full Faith and Credit issues,¹⁴⁵ so the problem would arise again with any out-of-state judgments that could provide a basis for an injunction in California. In *Keener*, the United States Court of Appeals for the Eleventh Circuit struggled to obtain a substantially fair result while satisfying the requirements of Full Faith and Credit.¹⁴⁶ One of the sources of the difficulty in *Keener* was a Georgia law that prohibits the state’s courts from extending comity to sister states where enforcement of a sister state’s judgment or law would be contrary to Georgia public policy or prejudicial to the interests of the state.¹⁴⁷ Thus, the court in *Keener* was deprived of a comity “escape hatch” that the Supreme Court of California used in *Medtronic*.

¹⁴² *Id.*

¹⁴³ *See id.* (“We might be required to hold, if some future case raises the issue, that an otherwise valid judgment cannot intrude upon essential processes of courts outside the issuing state in certain narrow circumstances, but we need not announce or define that principle here.”).

¹⁴⁴ Price, *supra* note 16, at 751.

¹⁴⁵ *See* *Advanced Bionics Corp. v. Medtronic*, 59 P.3d 231, 237 (Cal. 2002).

¹⁴⁶ *Keener v. Convergys Corp.*, 342 F.3d 1265, 1269–70 (11th Cir. 2003). The court was clearly unhappy with granting a nationwide injunction to the employee-plaintiff in the case, given evidence that the employee-plaintiff had deceived his former employer in an effort to win the “race to the courthouse” and obtain a forum with favorable law. *Id.* at 1270.

¹⁴⁷ GA. CODE ANN. § 1-3-9 (2006). Notably, in the Supreme Court of Georgia’s answer to the Eleventh Circuit’s certified question, one judge urged the Georgia legislature to adopt RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (1989), providing that courts should honor the law of a sister state when parties have chosen that sister state to govern their contractual relationship. *Convergys Corp. v. Keener*, 582 S.E.2d 84, 87–88 (Ga. 2003) (Sears, J., concurring).

Georgia's public policy against enforcing non-competes stems from a constitutional mandate barring the Georgia Assembly from passing laws that authorize contracts that interfere with competition.¹⁴⁸ Covenants ancillary to employment contracts—including non-competes—receive strict scrutiny and are not “blue-penciled,” meaning that if any portion of the agreement fails to pass scrutiny, the entire agreement fails.¹⁴⁹ To be enforceable in Georgia, a non-compete must be: reasonable; supported by valuable consideration; “reasonably necessary to protect the interest of the party in whose favor it is imposed”; and must not “unduly prejudice the interests of the public.”¹⁵⁰ On certification from the United States Court of Appeals for the Eleventh Circuit, the Supreme Court of Georgia made clear in *Keener* that it would not enforce a choice-of-law clause in a non-compete contract where application of the chosen law would violate state policy and prejudice state interests.¹⁵¹ Based on this stance, it seems unlikely that the state would extend comity to another state in a non-compete dispute.¹⁵² Thus, the court in *Keener* was forced to tackle the equity conflict directly, and sought a way to confine the reach of Georgia's public policy to Georgia.¹⁵³

D. Sovereignty Concerns Lie at the Heart of the Equity Conflict

At the heart of the hesitation to apply blanket Full Faith and Credit to equitable decrees¹⁵⁴ are concerns about state sovereignty, which become apparent when considered in the light of controversial moral issues that generate animosity among the states.¹⁵⁵ For example, in the case of *Wilson v. Ake*,¹⁵⁶ the United States District Court for

¹⁴⁸ GA. CONST. art. III, § 6, para. V(c) (codified by statute at GA. CODE ANN. § 13-8-2 (2006)).

¹⁴⁹ *Northside Hosp., Inc. v. McCord*, 537 S.E.2d 697, 699 (Ga. Ct. App. 2000).

¹⁵⁰ *Id.*

¹⁵¹ *Convergys Corp. v. Keener*, 582 S.E.2d 84, 85–86 (Ga. 2003).

¹⁵² *See id.*

¹⁵³ *See Keener v. Convergys Corp.*, 342 F.3d 1264, 1269 (11th Cir. 2003).

¹⁵⁴ The American Bar Association Committee on Jurisprudence and Law Reform in 1927 proposed an amendment to the Federal Full Faith and Credit statute that would institute blanket Full Faith and Credit for all equitable decrees. Price, *supra* note 16, at 826–29. The proposal was put to Congress, and failed to reach a floor vote. *Id.*

¹⁵⁵ For example, in the context of the slavery debate, Full Faith and Credit was superseded by the Fugitive Slave Clause. *See* Anthony J. Sebok, Note, *Judging the Fugitive Slave Acts*, 100 YALE L. J. 1835, 1847 n.68 (1991). In a more modern context, Congress passed the Defense of Marriage Act, which exempts states from extending Full Faith and Credit to same-sex marriage decrees issued by other states. 28 U.S.C. § 1738C (2006).

¹⁵⁶ 354 F. Supp. 2d 1298 (M.D. Fla. 2005).

the Middle District of Florida objected to applying Full Faith and Credit to an out-of-state same-sex marriage decree on the grounds that it violated the public policy of Florida.¹⁵⁷ In doing so, the court ignored Justice Ginsburg's clear rejection of a "public policy exception" to Full Faith and Credit in *Baker*.¹⁵⁸ However, the *Wilson* court summed up concerns about applying Full Faith and Credit to equity when it deplored giving any one state a "license . . . to create national policy."¹⁵⁹

In the context of non-competes, sovereignty concerns run both ways. If, as the court found in *Keener*, Georgia should not be allowed to export its public policy against non-competes to other states,¹⁶⁰ then neither should Minnesota's public policy favoring non-competes be exported to California or Georgia.

IV. THE BOUNDARIES OF FULL FAITH AND CREDIT

A. *The Known Reach of Full Faith and Credit*

The purpose of Full Faith and Credit was to alter "the status of the several states" so that a "remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin."¹⁶¹ Yet, "[t]here are some limitations upon the extent to which a state may be required by the full faith and credit clause to enforce even the judgment of another state in contravention of its own statutes or policy."¹⁶² Even still, "our decisions support no roving 'public policy ex-

¹⁵⁷ *Id.* at 1304.

¹⁵⁸ *Baker v. Gen. Motors*, 522 U.S. 222, 233 (1998). A full discussion of the application of Full Faith and Credit in the context of same-sex marriage and other moral issues is beyond the scope of this Comment. However, interestingly, the *Wilson* court's decision was based on a faulty interpretation of *Nevada v. Hall*, 440 U.S. 410 (1979), and *Pac. Employers Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493 (1939). Both cases hold that courts need not extend Full Faith and Credit to the laws of other states, and thus may consider their own state's public policy in making choice-of-law decisions; neither case supports a "public policy exception" to Full Faith and Credit. In *Hall*, the Court held that the California courts need not apply a Nevada sovereign immunity statute in a case where a California citizen sued the state over an automobile accident involving a state employee. *Hall*, 440 U.S. at 421–22. In *Pac. Employers Ins. Co.*, the Court held that California was not required to apply a Massachusetts worker's compensation law in a case where a Massachusetts employee, who was injured while in California, sued to recover in California. *Pac. Employers Ins. Co.*, 306 U.S. at 502.

¹⁵⁹ *Wilson*, 354 F. Supp. at 1303.

¹⁶⁰ See *Keener v. Convergys Corp.*, 342 F.3d 1269 (11th Cir. 2003).

¹⁶¹ *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 276–77 (1935).

¹⁶² *Pac. Employers Ins. Co.*, 306 U.S. at 502.

ception' to the full faith and credit due *judgments*.”¹⁶³ With so many seemingly contradictory pronouncements, it is worthwhile to develop areas where precedent has established that Full Faith and Credit applies, and in areas where Full Faith and Credit does not reach, to see where the enforcement of non-competes might fit.

First, Full Faith and Credit applies to court determinations as to the *merits of a claim*. To examine what is meant by a court's determination as to the *merits* of a claim as opposed to its determination of the appropriate *remedy*, it is useful to compare the *Roche* and *M'Elmoyle* cases. In both cases, a court issued a judgment, and the plaintiff failed to collect on that judgment in a specified amount of time.¹⁶⁴ However, in *Roche*, enforcement of the sister state's judgment was denied on the grounds that it *would have been void had the action been filed originally in the enforcing state*.¹⁶⁵ Clearly, courts cannot “second-guess” other courts in this manner. As in *Fauntleroy*, a court cannot decline Full Faith and Credit to a sister court's determination that a contract was valid based on the fact that, had it had the opportunity to review the facts of the case, the court would have found the same contract to be invalid.¹⁶⁶ In contrast, *M'Elmoyle* involved no second-guessing of the first court; the Georgia court's holding in *M'Elmoyle* was not that the South Carolina court had been wrong, but rather that the plaintiff had failed to abide by Georgia law regarding the *enforcement* of foreign judgments.¹⁶⁷ These cases are a basic expression of the doctrine of *res judicata* that a claim, once determined in one state, cannot be relitigated in another.¹⁶⁸

Second, money judgments in one state are enforceable in all states.¹⁶⁹ The question might reasonably be raised as to why courts should reach opposite results depending on whether the plaintiff employer seeks specific enforcement or money damages. Both compel the defendant to act: in the case of the injunction, to obey the agreement; in the case of the money judgment, to pay money.

The difference in the treatment of legal and equitable remedies is rooted in the centuries-old common law distinction between law

¹⁶³ *Baker*, 522 U.S. at 233.

¹⁶⁴ See *M'Elmoyle v. Cohen*, 38 U.S. 312 (1839); see also *Roche v. McDonald*, 275 U.S. 449, 451 (1928).

¹⁶⁵ *Roche*, 275 U.S. at 451.

¹⁶⁶ See *Fauntleroy v. Lum*, 210 U.S. 230, 234–37 (1908).

¹⁶⁷ See *M'Elmoyle*, 38 U.S. at 324.

¹⁶⁸ See *id.* at 328.

¹⁶⁹ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 100 (1971).

and equity courts.¹⁷⁰ Although the law and equity courts have long since merged in most jurisdictions,¹⁷¹ there remain reasons why legal and equitable judgments should be treated differently: the geographic reach and types of behavior addressed by equitable decrees is expanding;¹⁷² there is coercion present in equitable judgments, which are enforced through contempt, that is not present with money judgments;¹⁷³ and application of Full Faith and Credit to money judgments has a stronger and more settled grounding in history and precedent.¹⁷⁴ Furthermore, unlike legal remedies, the use of equitable remedies has long been considered a matter of discretion for the enforcing court, and it is questionable whether a foreign court should be allowed to compel the use of that discretion through the application of Full Faith and Credit.¹⁷⁵ However, perhaps most importantly, the application of Full Faith and Credit to equitable judgments generates “interstate conflict” and raises concerns about state sovereignty and federalism that legal judgments generally do not.¹⁷⁶

B. The Known Limits of Full Faith and Credit

Next, it is useful to list the areas in which precedent indicates that Full Faith and Credit does not apply. First, Full Faith and Credit does not require a state to apply another state’s law over its own law, although this limit is pertinent only to choice-of-law determinations, i.e., when a court is deciding which state’s law to apply to a determi-

¹⁷⁰ See Price, *supra* note 16, at 751–52. Legal judgments are said to attach to the defendant’s property, whereas equitable judgments attach to the person and control future action. *Id.*

¹⁷¹ See *id.* at 811–17.

¹⁷² The use of equitable relief has expanded since the nineteenth century, when the use of equitable power was generally limited to the protection of property rights, circumstances of imminent irreparable harm, and circumstances where legal remedies were found to be inadequate. *Id.* at 815–16. Courts have moved away from these traditional limitations. *Id.* at 816–17. In addition, courts today increasingly apply equitable relief in cases involving interstate commercial activities, further contributing to the expansion of the use of far-ranging equitable remedies. *Id.* at 817.

¹⁷³ See Price, *supra* note 16, at 752 (“Equitable relief demands obedience of a defendant, but in most cases a court can only obtain compliance with the decree through threat of contempt.”).

¹⁷⁴ *Id.* at 755–56.

¹⁷⁵ See *id.* at 815 (injunctions were “always considered a ‘discretionary remedy’”); see also *id.* at 835 (“The inherent discretion and flexibility of remedial equitable decrees . . . increases the likelihood that cases raising Baker-like problems will continue to prevent coherent resolution of the equity conflict.”).

¹⁷⁶ See *id.* at 835.

nation as to the merits of a case, and not whether to enforce a sister state's judgment.¹⁷⁷

Justice Ginsburg summarized the remaining areas succinctly in her opinion in *Baker*.¹⁷⁸ As established in *M'Elmoyle*, states need not, under Full Faith and Credit, adopt the "time, manner, and mechanisms" other states use for enforcing judgments.¹⁷⁹ In addition, Full Faith and Credit need not be extended to extraterritorial equitable orders that attempt to "accomplish an official act within the exclusive province" of another state or interfere "with litigation over which the ordering State had no authority."¹⁸⁰ The *Baker* majority opinion offers several examples, one being that a state court judgment cannot be effective to transfer title to land in another state.¹⁸¹ Anti-suit injunctions regarding out-of-state litigation have not been effective to stop the litigation because they do not address the merits of the case, and thus are not given preclusive effect under Full Faith and Credit.¹⁸² Furthermore, sanctions for violating an injunction are "generally administered by the court that issued the injunction."¹⁸³ Finally, the issue directly addressed in *Baker* presumably can be added to this list.¹⁸⁴ The question is whether injunctions related to non-competes are within the category of "acts within the exclusive province" of a state, and thus lie beyond the reach of Full Faith and Credit.¹⁸⁵

V. DECISIONS CONCERNING SPECIFIC PERFORMANCE OF NON-COMPETES ARE WITHIN THE EXCLUSIVE PROVINCE OF A STATE

The prospect of awarding specific enforcement to plaintiffs seeking to enforce foreign judgments upholding non-competes would be vexing for the courts of California and Georgia because, by the very act of granting such an award, these courts would be violating their

¹⁷⁷ See cases cited *supra* note 158.

¹⁷⁸ See *Baker*, 522 U.S. at 235–36.

¹⁷⁹ *Id.* at 235.

¹⁸⁰ *Id.* These are the "two broad exceptions" Justice Kennedy believes the Court has created in *Baker*. *Id.* at 243 (Kennedy, J., concurring).

¹⁸¹ *Id.* at 235 (citing *Fall v. Eastin*, 215 U.S. 1 (1909)).

¹⁸² *Id.*

¹⁸³ *Baker*, 522 U.S. at 236. The Court cites *Stiller v. Hardman*, 324 F.2d 626, 628 (2d Cir. 1963), in which the enforcing court granted the monetary portion of a judgment made in a sister state but declined to enforce the injunctive portion. *Id.*

¹⁸⁴ Specifically, *Baker* establishes that "full faith and credit principles do not compel the state to enforce another state court's injunction prohibiting unrelated potential plaintiffs from access to privileged or confidential information." Price, *supra* note 16, at 768.

¹⁸⁵ See *Baker*, 522 U.S. at 235.

own state's public policy and law. Particularly in the case of Georgia, the courts must consider a constitutional command declaring that anti-competitive contracts are "unlawful and void."¹⁸⁶ Thus, because of Full Faith and Credit, a Georgia court might be required to restrain trade when the Georgia Constitution indicates that it may not do so.

A possible solution to the problem would be for the Georgia court to determine that it is constitutionally forbidden from restricting a citizen's ability to seek employment via an award of specific enforcement. A Georgia court could hold that it lacks the power to grant specific enforcement in a way that violates its constitution. A similar, although perhaps less powerful, argument could be made in the case of the California courts, where non-competes are void under statutory law.¹⁸⁷ Although statutes lack the force of a state constitution, California courts could conclude that an injunction upholding a non-compete itself would violate the California code, and thus is beyond the court's power to grant.¹⁸⁸

In justifying these conclusions, the Georgia and California courts could take the position that their decisions on these issues are within the exclusive province of a state, and thus are beyond the reach of Full Faith and Credit as described in *Baker*. In support of this position, these courts could hold that they have a sovereign right to interpret their own constitutions.¹⁸⁹ In addition, they could find that courts in one state may not directly compel courts in another state to take action; thus, Full Faith and Credit should not work to compel them to exercise their equitable discretion in a way that creates a conflict with their state constitution and law.¹⁹⁰

In support of this position, it is important to distinguish *Roche* and *Fauntleroy*, where the Court found it impermissible for one court

¹⁸⁶ GA. CONST. art. III, § 6, para. V(c).

¹⁸⁷ CAL. BUS. & PROF. CODE § 16600 (Deering 2006).

¹⁸⁸ *See id.* California law mandates that all contracts that restrain anyone from participating in a trade, profession, or business are void. *Id.* The state law does not suggest specifically that out-of-state judgments upholding non-competes should not be enforced. However, given the strong language of the statute, the California courts reasonably could interpret the statute as barring them from restraining citizens from working in a trade, profession, or business.

¹⁸⁹ *See, e.g.,* Connecticut v. Johnson, 460 U.S. 73, 81 n.9 (1982) ("State courts, of course, are free to interpret their own constitutions and laws . . .").

¹⁹⁰ *See, e.g.,* Baker v. Gen. Motors, 522 U.S. 222, 236 (1998) (anti-suit injunctions constrain parties, but not courts). Courts have no *direct* authority outside their jurisdiction, only *indirect* power to cause parties within their jurisdiction to take extraterritorial action. *See* Pennoyer v. Neff, 95 U.S. 714, 722 (1878); *see also supra* notes 107–11 and accompanying text.

to second-guess a foreign court's determination as to the merits of a case.¹⁹¹ In denying Full Faith and Credit to an injunction arising out of non-compete litigation in another state, a court would be making a decision concerning the *execution* of a foreign judgment, as in *M'Elmoyle*, rather than making a determination of the merits of the case.¹⁹² Thus, Georgia and California could argue that declining to issue an injunction to enforce a non-compete upheld in a sister state does not run afoul of *Roche* or *Fauntleroy*.

Under this view of Full Faith and Credit, the expectations of both the employer and the employee are upheld. In *Medtronic*, one judge in a concurring opinion expressed concern that employees would relocate to California "to walk away from valid contractual obligations, claiming California policy as a protective shield."¹⁹³ Yet, the same might be said of an employer who uses the policy of states that uphold non-competes to override California's policy. The status-quo "race to judgment" benefits neither employers nor employees. Both are locked in an all-or-nothing gamble in which the first to obtain favorable judgment obtains nationwide relief, while the losing party gets nothing at all. Employers are arguably harmed in this race because the employee has the advantage. Only the employee knows where she is going, and the employee has the opportunity to choose the forum by filing for declaratory relief at the start of litigation. As was seen in *Medtronic*, only through the use of questionable courtroom tactics can the employer seeking to enforce a non-compete regain the advantage and hope to win the race.¹⁹⁴ Thus, there are sound policy reasons for limiting the geographic effect of equitable decrees in non-compete cases by limiting the reach of Full Faith and Credit. Courts can pay deference due other jurisdictions under res

¹⁹¹ See *Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908); see also *Roche v. McDonald*, 275 U.S. 449, 455 (1928).

¹⁹² See *M'Elmoyle v. Cohen*, 38 U.S. 312, 325 (1939).

¹⁹³ *Advanced Bionics Corp. v. Medtronic*, 59 P.3d 231, 239 (Cal. 2002) (Brown, J., concurring). Justice Brown states that California is "not a political safe zone vis-à-vis our sister states, such that the mere act of setting foot on California soil somehow releases a person from the legal duties our sister states recognize." *Id.* Justice Brown further argues that the equity conflict problem inherent in the *Medtronic* case could be resolved by California applying its own law to contracts formed within California, and out-of-state law when contracts are formed out of state. *Id.* at 238. However, the Supreme Court of the United States has upheld determinations by states that use their own social policy to make choice of law determinations. *Baker v. Gen. Motors*, 522 U.S. 222, 233 (1998). Thus, California might choose to apply out-of-state law, but would not be compelled to do so under Full Faith and Credit. See *Nevada v. Hall*, 440 U.S. 410, 421–22 (1979); see also *Pac. Employers Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 502 (1939).

¹⁹⁴ See *Medtronic*, 59 P.3d at 233–34.

judicata and Full Faith and Credit, while at the same time retaining sovereignty to uphold their own law.

VI. LIQUIDATED DAMAGE CLAUSES: AN EFFECTIVE ALTERNATIVE

In the portion of her article dealing with non-competes, Professor Price also asks whether a liquidated damages clause in such an agreement, reduced to judgment in one state, must be given Full Faith and Credit when sued upon in another state.¹⁹⁵ As discussed earlier,¹⁹⁶ there are valid reasons why we might want to treat legal and equitable judgments differently. In the case of a non-compete, a liquidated damages clause has the advantage of leaving both employer and employee with options.

A liquidated damages clause, if sufficiently large, could have the practical effect of making it infeasible for an employee to take a job with a competitor. However, enforcing such a clause differs from enforcing a non-compete via injunction in the key respect that an injunction directly limits the freedom of the employee to act, and carries the threat of contempt. With a liquidated damages clause, there is no threat of contempt, and the employee retains the option of paying the damages, perhaps with the assistance of the new employer. In any event, the employer seeking enforcement of a liquidated damages clause has no fear of being left empty-handed because either the agreement is enforced, or the damages are paid.

Once a court has issued a judgment on a liquidated damages clause, there appears to be little basis for an employee to challenge that judgment in a subsequent action in a court of parallel jurisdiction. As in *Fauntleroy*, a court's finding of a debt is res judicata and must be given Full Faith and Credit in all states; the fact that the contract upon which the debt is based would be invalid in another state is insufficient grounds to deny Full Faith and Credit.¹⁹⁷ A defendant might find some procedural fault by the plaintiff in enforcing the money judgment, as was the case in *M'Elmoyle*.¹⁹⁸ However, given the well-established enforceability of money judgments under Full Faith and Credit, it is doubtful that a court could find a constitutional or statutory problem with enforcing an out-of-state judgment on a liquidated damages clause in a non-compete.

¹⁹⁵ Price, *supra* note 16, at 834.

¹⁹⁶ See sources cited *supra* notes 168–74.

¹⁹⁷ *Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908).

¹⁹⁸ See generally *M'Elmoyle v. Cohen*, 38 U.S. 312, 324–28 (1839).

VII. CONCLUSION

Jurisdictional conflict manifests more frequently when Full Faith and Credit is applied to equitable remedies than to legal remedies. Equitable remedies are more varied, and impose more direct restraints upon the freedom of litigants, than legal remedies. A court might pass on a judgment for money damages from another state with little disturbance to its conscience. Equitable judgments, on the other hand, raise issues of policy that place courts in the dilemma of having to ignore their own law, or possibly violating the Constitution. Non-competes represent an example of the tension between these two interests, and also show how the interests can coexist. It is unlikely that the Founders intended Full Faith and Credit to be a mechanism whereby states such as Georgia and California could export their minority policies on non-competes across the nation. It is equally unlikely that the Founders intended Full Faith and Credit to be a loophole in state sovereignty, so that the law in the majority of states should become the law for the whole land, with no room for minority states such as California and Georgia to set their own course. Under the flexible standard set forth by the majority in *Baker*, there is no reason to reach such an all-or-nothing conclusion. The proper conclusion is that determinations as to the enforcement of out-of-state equitable judgments regarding non-competes—which raise questions about the court’s power and state policy—are within the “exclusive province” of individual states as described in *Baker*. Thus, California and Georgia can maintain their employee-friendly state policies against non-competes without fear of imposing their policies on the rest of the states in the nation.